89-906

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

J. H. H. and S. C. H.,
Petitioners,

vs.

JOSEPH J. O'HARA; WILMA ALLEN; DOROTHY HELTIBRAND; VIRGINIA ALLEN; DWAIN M. HOVIS; GARY STANGLER; JEANNIE ONEY; ANN GULICK; GARY THURMAN; DOROTHY LAVINGTON; ROSALIND CONNER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, for purposes of application of the qualified immunity doctrine, this Court's interpretation of the Equal Protection Clause clearly established as of August 23, 1984 and thereafter that state officials may not use the consideration of race as the sole factor in determining child custody in foster care.

2. Whether, for purposes of application of the qualified immunity doctrine, this Court's interpretation of the Equal Protection Clause clearly established as of August 23, 1984 and thereafter that state officials may not use the consideration of race as a substantial or motivating factor in determining child custody in foster care.

LIST OF PARTIES

The petitioners, who have proceeded below by way of their initials, are Jack and Sylvia Howard. The respondents include the following individuals: Joseph J. O'Hara; Wilma Allen; Dorothy Heltibrand; Virginia Allen; Dwain M. Hovis; Gary Stangler; Jeannie Oney; Ann Gulick; Gary Thurman; Dorothy Lavington; Rosalind Conner.

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No.

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J. H. H. and S. C. H.,
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JOSEPH J. O'HARA; WILMA ALLEN; DOROTHY HELTIBRAND; VIRGINIA ALLEN; DWAIN M. HOVIS; GARY STANGLER; JEANNIE ONEY; ANN GULICK; GARY THURMAN; DOROTHY LAVINGTON; ROSALIND CONNER,
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On Petition for a Writ of Certiorari to the
United States Court of Appeals For the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Jack and Sylvia Howard, respectfully pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Eighth Circuit, entered in the above captioned proceeding on June 23, 1989.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eighth Circuit is reported at 878 F.2d 240 (8th Cir. 1989) and is reprinted in the Appendix hereto at page A-1.

The Order denying petitioners' petition for rehearing and suggestion for rehearing en banc is unreported and is reprinted in the Appendix at page A-14.

The Order and Memorandum of the United States District Court is unreported and is reprinted in the Appendix hereto at pages A-15.

JURISDICTION

On June 23, 1989, the United States Court of Appeals for the Eighth Circuit issued its judgment and order affirming the dismissal of petitioners' suit on the basis of respondents' affirmative defense of qualified immunity.

Jurisdiction of the Court is invoked under 28 U.S.C. §§1254(i) and 2101(c).

STATUTE INVOLVED

Section 1 of the Ku Klux Klan Act of April 20, 1871, now codified at 42 U.S.C. §1983, reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners are licensed foster care parents who have provided care for thirty-eight foster children over an eighteen year span. On August 23, 1984, two black sisters were removed from petitioners' custody after having lived in foster care with petitioners

for over three years. The children were, respectively, four and three years of age.

Respondents, various officials employed by the Missouri Division of Family Services (hereinafter: agency officials), placed the sisters in a second foster home. The agency officials selected the second home based solely on the race of the residents of the home (i.e., black). The agency officials likewise refused to return custody of the sisters to petitioners based solely on the race of petitioners (i.e., white).[1]

Petitioners filed suit in the District Court pursuant to 28 U.S.C. §1331 and 1343(3). The agency officials thereafter moved for summary judgment on various grounds. The District Court granted summary judgment on the basis of respondents' affirmative defense of qualified immunity. On appeal, the Eighth Circuit Court of Appeals held that the Equal Protection Clause did not clearly prohibit state authorities from making child custody determinations in foster care on the basis of racial considerations.

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[1] Many issues of disputed fact certainly exist among the parties concerning the circumstances surrounding the denial of child custody to petitioners. Nevertheless, Rule 56 of the Federal Rules of Civil Procedure provides that disputed issues of fact should be resolved in favor of the non-moving party. The Statement of the Case has been framed pursuant to that standard. *Adickes v. S.H. Kress Co.*, 398 U.S. 144 (1970).

REASONS FOR GRANTING THE WRIT

In *Palmore v. Sidoti,* 466 U.S. 429 (1984), the Court established, at a minimum, that race may not, under the Equal Protection Clause, be the sole factor in determining the best interest of the child in custody matters. Nevertheless, after the issuance of the *Palmore* decision, the agency officials denied petitioners the custody of two foster children, who had resided with petitioners for over three years, solely on the basis of the petitioners' skin color. On appeal, the Eighth Circuit Court of Appeals, in applying the doctrine of qualified immunity, held that the actions of the agency officials did not violate well established principles of constitutional law.

The ruling of the Eighth Circuit precluded petitioners from even attempting to prove that the respondents' foster care decision was based solely and exclusively on considerations of race. This ruling directly conflicts with this Court's prior decisions which hold that state authorities may be held liable in damages for violations of clearly established constitutional law. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982).

In addition, the *Palmore* decision established more than merely that race may not provide the sole basis for a child custody determination. In actuality, the *Palmore* decision was the culmination of a line of cases which unequivocally established that considerations of race may play no role whatsoever in the state regulation of family and domestic relationships. The decision below is, again, in conflict with the *Palmore* decision in that petitioners' race was a substantial or motivating factor in the agency officials' denial of child custody.

The unconstitutionality of state-imposed racial segregation has been one of the resounding and uncompromising themes of this country's courts for over three decades. *Brown v. Board of Education,* 347 U.S. 483 (1954). No "reasonable" state official can claim to have been unaware of the import and application of these constitutional decisions. *Arlington Heights v.*

Metropolitan Housing Development Corporation, 429 U.S. 252 (1977). By accepting certiorari, the Court can lay to rest the sinister suggestion raised in this case that state-sponsored racial segregation may somehow be countenanced in a democratic society.

I.

The Decision Below Conflicts With All Modern Interpretations Of The Equal Protection Clause As They Relate To Determinations Of Child Custody And Prior Applications Of The Qualified Immunity Doctrine.

Surprisingly, all of the parties and the Eighth Circuit Court of Appeals appear to agree on the following proposition of law: the *Palmore* decision, at the least, "establishes that race may not be the sole factor in determining the best interest of the child." *J.H.H. v. O'Hara*, 878 F.2d 240, 245 (8th Cir. 1989) and Appendix at A-12. Foster care, like nearly all other matters involving child custody, has been governed historically in Missouri and other states by the "best interests of the child" standard. See, e.g., *In Interest of R. K. W.*, 689 S.W.2d 647 (Mo. 1985); *McLaughlin v. Pernsley*, 693 F.Supp. 318 (E.D. Pa. 1988) aff'd 876 F.2d 308 (3rd Cir. 1989); *Drummond v. Fulton County Dep't of Family and Children Services*, 563 F.2d 1200 (5th Cir. 1977); *Compos v. McKeithen*, 341 F.Supp. 264 (E.D. La. 1972). No court in this century has held or even suggested that child custody may constitutionally be determined solely and exclusively on the basis of racial considerations. *Beazley v. Davis*, 545 P.2d 206 (Nev. 1976); *In re Marriage of Kramer*, 297 N.W.2d 359 (Iowa 1980); *Fontaine v. Fontaine*, 9 Ill.App.2d 482, 133 N.E.2d 532 (1956); Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, fn. 34 (1984) ("Agency or judicial policy to deny [child] placement solely on the basis of race is...unconstitutional...").

Despite this unanimity of judicial thought, the Eighth Circuit sustained the application of qualified immunity on behalf of each agency official. In doing so, the appellate court applied the affirmative defense of qualified immunity in a manner directly in conflict of the pronouncements of this Court.

The inconsistency may be found in footnote five of the decision below. In that footnote, the appellate court erroneously commingled the elements of the "mixed-motive" analysis with petitioners' argument that they should be allowed to show the pretextual nature of each of respondents' alternative justifications for their foster care decision. By doing so, the Eighth Circuit denied petitioners any opportunity at all to prove a violation of the well established constitutional principle that they may not be denied child custody solely on the basis of their race. Such a result squarely conflicts with this Court's pronouncement regarding the meaning of the Equal Protection Clause in *Palmore v. Sidoti*, 466 U.S. 429 (1984) and the proper application of the doctrine of qualified immunity as articulated in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).[2]

---

[2] The practical consequence of the different interpretations of the *Palmore* decision as set forth in Part I and Part II of this petition relates to the burdens of proof that must be assumed by the parties. Thus, if *Palmore* only prohibited the consideration of race as the *sole* factor in a custody decision, then it would be encumbent upon petitioners to show both that race played a role in the denial of custody *and* that respondents' alternative reasons for the custody decision were entirely pretextual. By contrast, under the substantial factor analysis (or the mixed-motive test), petitioners need only show that race was a substantial or motivating factor in the adverse custody decision. If proven, the burden would then shift to respondents to establish that the same decision would have been made absent the racially discriminatory consideration. See, *Arlington Heights, supra*, 429 U.S. at 270-71.

In any event, petitioners' evidence will allow them to proceed on either theory. Certiorari must therefore be granted whether or not petitioners' argument in Part II of this petition is a correct reading of the *Palmore* decision.

II.

The Decision Below Conflicts With All Modern Interpretations Of The Equal Protection Clause Which Prohibit The Consideration Of Race As A Substantial Or Motivating Factor In The Awarding Of Governmental Benefits And Privileges.

Racial segregation has long been outlawed at public parks, *Wright v. State of Georgia,* 373 U.S. 284 (1963), on the golf course, *New Orleans City Park Improvement Association v. Detiege,* 252 F.2d 122 aff'd 358 U.S. 54 (1958), in the voting booth, *Virginia Board of Elections v. Hamm,* 379 U.S. 19 (1964), in zoning and housing matters, *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252 (1977); *Buchanan v. Warley,* 245 U.S. 60 (1917), in the public schools, *Brown v. Board of Education,* 247 U.S. 483 (1954), and in public employment, *Washington v. Davis,* 426 U.S. 597 (1976). *Palmore v. Sidoti, supra,* silenced any debate as to whether a special niche should be carved out, free from constitutional scrutiny, for matters involving child custody and racial discrimination. *Palmore* is the culmination of a series of Supreme Court decisions which establish that the consideration of race plays no role whatsoever in the state regulation of family and domestic relationships. See, e.g., *McLaughlin v. State,* 379 U.S. 184, 85 S.Ct. 283 (1964); *Loving v. Virginia,* 388 U.S. 1, 87 S.Ct. 1817 (1967).

The decision below asserts that the custody decision in *Palmore* was based solely on considerations of race and, under that specific circumstance only, denied equal protection of the law. *J.H.H. v. O'Hara, supra,* 878 F.2d at 245 and Appendix at A-12. This assertion is quite wrong.

According to this Court's description in *Palmore,* the trial court denied custody to the mother after considering the race of her new husband *and* after reviewing allegations that the mother "had not properly cared for the child . . ." and "carried on a sexual relationship . . . without being married . . ." 466 U.S. at

430, 431. Race was only one factor, among several others, that was considered by the trial court in denying custody. Nevertheless, this Court ruled that the Equal Protection Clause was violated because race was the "controlling factor", *id* at 432, in the child custody determination of the trial court.

The decision below squarely contradicts the pronouncements of this Court that equal protection of the law prohibits the use of racial considerations as a substantial or motivating factor in governmental decisions. Once the "substantial factor" test is met by the plaintiff, the burden then shifts to the state authority to prove that the same decision would have been reached absent the discriminatory animus. This mixed-motive test has been the law for over a decade. See, *Price Waterhouse v. Hopkins,* ____, U.S. ____, ____ S.Ct. ____, 104 L.Ed.2d 268, 286-87 (1989) for a summary of the law on this issue since 1977.

If left to stand, the lower decision will eviserate the plain meaning of this Court's unanimous opinion in *Palmore v. Sidoti, supra.* Moreover, the lower court's peculiar interpretation of the mixed motive analysis at footnote five of the opinion threatens to undermine the clear standards announced by this Court on the topic in *Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 270, n. 21 (1977).

Finally, if, as suggested by the opinion below, it is not "well established" that the Equal Protection Clause forbids state-sponsored racial segregation, the question will inevitably arise as to whether racial segregation is prohibited at all by the United States Constitution. Thus, the lower decision represents more than merely an inconsistent, but aberrational, application of this Court's equal protection analysis. Rather, the decision below signals a clear retreat from the principle of law that has quite literally dominated the attention of this Court and the American people for the better part of this century, to wit: that a democratic and civilized society cannot tolerate the bestowing of governmental benefits and privileges on the basis of the color of one's skin.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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December 4, 1989

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

(Filed Sept. 21, 1989)

No. 88-2224EM

Appeal from the United States District Court
for the Eastern District of Missouri

J.H.H. and S.C.H.,
Appellants,

v.

Joseph J. O'Hara; Wilma Allen; Dorothy Heltibrand; Virginia Allen; Dwain M. Hovis; Gary Stangler; Jeannie Oney; Ann Gulick; Gary Thurman; Dorothy Lavington; Rosalind Conner,
Appellees.

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the district court in this cause be affirmed in accordance with the opinion of this Court.

June 23, 1989

A true copy.
ATTEST:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

MANDATE ISSUED 9/20/89

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2224

Appeal from the United States District Court
for the Eastern District of Missouri.

J.H.H. and S.C.H.,

Appellants,

v.

Joseph J. O'Hara; Wilma Allen; Dorothy Heltibrand; Virginia Allen; Dwain M. Hovis; Gary Stangler; Jeannie Oney; Ann Gulick; Gary Thurman; Dorothy Lavington; Rosalind Conner,

Appellees.

Submitted: January 10, 1989

Filed: June 23, 1989

Before JOHN R. GIBSON and MAGILL, Circuit Judges, and WATERS,* Chief District Judge.

MAGILL, Circuit Judge.

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* THE HONORABLE H. FRANKLIN WATERS, Chief United States District Judge for the Western District of Arkansas, sitting by designation.

Plaintiffs J.H.H. and S.C.H. are a white couple licensed by the State of Missouri to provide foster care. Plaintiffs filed suit under 28 U.S.C. §1983 against eleven officials and employees of the Missouri Division of Family Services (the Division), claiming their right to equal protection was violated because a decision not to return two black foster children to the plaintiffs' home was based solely on race. The district court[1] dismissed plaintiffs' claims for money damages against the Division employees on grounds of qualified immunity. Because we find that plaintiffs' claim is not based on a clearly established constitutional right, we affirm.

I.

A. Facts

Plaintiffs have been licensed foster parents since 1969. In 1984, they held a provisional Foster Family Group Home license. In August 1984, plaintiffs' household included two natural children, two adopted children, and eight foster children placed by the Division. On August 13, two of the foster children in their care (siblings J.B. and T.B.) visited their natural mother. On that date, officials received a "hot line" report that J.B. had been physically abused. Pending an investigation of the alleged abuse, J.B. and T.B. were not returned to plaintiffs' custody. On August 17, two other foster children, siblings C.R. and L.R., were moved to a different foster home, apparently in accord with the Division's long-term placement plan for the two children. On August 23, at the direction of Joseph O'Hara, director of the Division, the four remaining foster children, R.T., A.T., J.W. and M.W., were removed from the plaintiffs' home. R.T. and A.T. were placed in the foster care of the J.'s, a black couple.

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[1] The Honorable Clyde S. Cahill, United States District Judge for the Eastern District of Missouri.

A juvenile officer of the St. Louis County Juvenile Court investigated the allegation of abuse, and found reason to suspect that physical abuse had occurred. The investigation never identified the perpetrator of the abuse.

On September 17, plaintiffs, through their attorney, voluntarily surrendered the Group Home license, and proposed that they be allowed to retain a Foster Home license. Plaintiffs also requested that R.T., A.T., J.W. and M.W. be returned to their care as early as possible and expressed their interest in adopting the four children.

On September 19, O'Hara approved the surrender of the Family Group Home license and the provisional retention of a Foster Family license permitting placement of two children in plaintiffs' home. O'Hara also wrote that J.W. and M.W., who were white, "will be returned to the [plaintiffs'] home for continued placement with a plan for adoption," and that R.T. and A.T. "will *not* be returned because a more appropriate placement has been located." The plaintiffs requested the Division to reconsider its placement plans for R.T. and A.T., and on October 19, O'Hara reiterated the Division's decision on the grounds that placement of R.T. and A.T. with plaintiffs was "not appropriate." O'Hara reported that the decision was based on the Division's conclusion that the incident of reported child abuse was "the result of stress due to heavy continuous child care responsibilities" in plaintiffs' home, and that "child abuse or neglect would likely reoccur if all the children were to remain in the home."

Thereafter, plaintiffs appealed the decision not to return A.T. and R.T. to their home through the Division's five-step foster parent grievance process.

B. Grievance Process

After a step-one conference between the plaintiffs and defendants Wilma Allen and Dorothy Lavington (both social service

supervisors with the Division), Allen denied plaintiffs' request based on (1) the investigation of the August 13, 1984 child abuse report, which found "reason to suspect" that the allegations of child abuse were true; (2) the placement of J.W. and M.W. in plaintiffs' home in October 1984, under the provisional license for two children; and (3) the "agency's plan for [R.T. and A.T.] for them to remain in their present foster home."

At step two, defendant Dorothy Heltibrand, a "Social Service Supervisor III," denied the plaintiffs' grievance. Because their provisional Foster Family license permitted placement of no more than two children, and J.W. and M.W. were already placed in plaintiffs' home, Heltibrand concluded that "the replacement of the [T.] children in your home is not possible."

At step three, the Division conducted a hearing to review plaintiffs' grievance. By letter of February 27, 1985, defendant Virginia Allen, county director of the Division, summarized the hearing and delivered the Division's decision denying plaintiffs' grievance. Allen's letter reports agreement by all parties that A.T. and R.T. were removed from plaintiffs' home following the child abuse report, and that the perpetrator of the abuse was still unknown. Christine Schmitt, an adoption specialist with the Division, reported that plaintiffs were doing "an outstanding job" in handling the adoption of J.W. Christine Keefer, a juvenile court officer, opined that plaintiffs provided "an outstanding foster home" and that a return to their home with a plan for adoption would be in the best interests of R.T. and A.T. Lynn Phelps, a Division licensing worker, considered plaintiffs' home "an exceptional home and resource for children." Dorothy Lavington, the plaintiffs' foster case worker, described plaintiffs as "a warm, nurturing family," with "strong bonds" between A.T., R.T., and plaintiffs' family, and testified that when R.T. and A.T. were removed, it was the Division's intent to return them to the plaintiffs' home. At the time of the hearing, however, Lavington believed that the foster family with whom the T. children were placed after

removal from the plaintiffs' home "will be better able to meet the children's needs as foster parents because they are of the same race." Three foster parents also testified, including two black foster mothers who stated that they had a close relationship with plaintiffs' family and provided support, especially in the area of race and culture, for the plaintiffs' foster children. Allen concluded her summary of the hearing by observing that "[a]ll of the other witnesses were unanimous in their overwhelming support and approval of the unique, warm, loving, positive, healthy parenting provided for all of the children in your home."

Allen indicated that plaintiffs' witnesses and the Division's workers and supervisors who testified "were unanimous in their praise for the excellent care you have provided to your own, adoptive and foster children through the years," and that the "agency's assessment of your capabilities as loving and responsible parents" was reflected in the fact that plaintiffs adopted children, had one child placed for adoption (J.W.), and had one foster child (M.W.) for whom the plan may be adoption. Nonetheless, the Division decided that continued placement in the J.s' home would best meet the future needs of A.T. and R.T. The Division's plan for the children—eventual reunification with the natural father—would best be met by continued placement with the J.s, as they were "able to provide both cultural and religious experiences to prepare the children for this event."

At step four, defendant Dwain Hovis, acting deputy director of the Division, denied plaintiffs' grievance. Hovis found that the decision to remove A.T. and R.T. from plaintiffs' home was based "upon substantial evidence that the best interests of the children would not be served if they remained in your care." Hovis indicated that since the removal of the children from plaintiffs' home, the Division's case plan for the children had changed from one of placement for adoption to eventual reunification with their natural father. Thus, the "racial and

cultural needs of the children" became "a primary consideration" after the change in the placement plan and replacement in the plaintiffs' home would not be in the children's best interests.

On April 30, 1985, Gary Stangler, the Division's acting director, denied plaintiffs' grievance at the fifth and final step of the grievance procedure.[2] Stangler concluded that removal of A.T. and R.T. from the defendants' home was appropriate and in their best interest, and that "the children should be in a home that has a similar cultural and ethnic background to their own."

C. District Court

On January 27, 1987, plaintiffs filed suit for compensatory and punitive damages and injunctive and declaratory relief. Plaintiffs alleged that the Division's decision not to return A.T. and R.T. to their home was made pursuant to a Division policy mandatory that minority children be placed with families of similar racial or ethnic characteristics. They alleged further that the individual defendant's actions taken pursuant to this policy violated their constitutional rights to equal protection.

After substantial discovery, defendants filed a motion for summary judgment. The district court ruled that plaintiffs failed to show that defendants acted in "bad faith" and thus defendants were entitled to qualified immunity on the claim for money damages. The district court found "good faith" on the part of the defendants in plaintiffs' admission that "defendants acted pursuant to Missouri Division of Family Services regulations." The district court granted defendants' motion for summary judgment, but dismissed the case without prejudice, giving plaintiffs thirty days in which to reopen the case in pursuit of their equitable remedies.

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[2] Under Mo. Rev. Stat. §536.100, plaintiffs could have pursued judicial review of the Division's final decision denying their grievance.

II.

Plaintiffs challenge the Division's "Guidelines for Placement Resource Selection" which they characterize as a "formal policy of segregation in foster care." They allege that, in acting pursuant to this Division policy, defendants denied their requests for care and custody of A.T. and R.T. because plaintiffs were white and the girls were black. We first look at the legal standard for reviewing claims of qualified immunity and then address each of these contentions in turn.

A. Qualified Immunity

The defense of qualified immunity represents an accommodation of competing social interests whereby officials who knowingly violate the law are held accountable while officials who reasonably perform their discretionary duties may act without the fear of a lawsuit imposing personal liability. *Arcoren v. Peters,* 829 F.2d 671, 673 (8th Cir. 1987) (en banc). To overcome a defense of qualified immunity, plaintiffs must establish that the "legal norms allegedly violated by the defendants were clearly established at the time of the challenged actions * * *." *Boswell v. Sherburne County,* 849 F.2d 1117, 1120 (8th Cir. 1988) (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 528 (1985)). To determine this "purely legal question," the courts (1) consider what specific conduct is complained of, and (2) look to statutory and case precedent and well-established general principles of law. *Davis v. Shearer,* 104 S. Ct. at 3022 (Brennan, J., concurring); *Myers v. Morris,* 810 F.2d 1437, 1459 (8th Cir. 1987). In determining whether the legal right at issue is "clearly established," this circuit applies a flexible standard, requiring "some, but not precise factual correspondence" with precedent, and demanding that officials apply general, well-developed legal principles. *Lappe v. Loeffelholz,* 815 F.2d 1173, 1177 (8th Cir. 1987).

B. Foster Home Criteria

Plaintiffs' factual challenge is directed to the "Guidelines for Placement Resources Selection" published by the Division as part of its Alternative Care Handbook, which took effect on February 1, 1983. Guideline No. 3 includes, as one of the issues to be considered in selecting a particular foster home:

> The ability of the foster family to preserve the child's racial, cultural, ethnic, and religious heritage. In most cases, every attempt must be made to match the child with a foster family with the same racial, cultural, ethnic, and religious background.

A summary statement of the standard appearing in the Guidelines states: "Minority children shall be placed with families of similar racial and ethnic characteristics."[3]

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[3] The Guidelines at issue contained six "Issues to be Considered in Selecting a Particular Foster Home:"

a. Proximity of the foster home to the child's family in order to facilitate visitation and reunification.

b. The extent to which the foster family can accept the child's relationship with his family and can deal adequately with situations which may arise from that relationship.

c. The ability of the foster family to preserve the child's racial, cultural, ethnic, and religious heritage. In most cases, every attempt must be made to match the child with a foster family of the same racial, cultural, ethnic and religious background.

d. The extent to which the interests, strengths, and abilities of the foster family enable the family to relate to the child's needs, including his individual problems; age; interests; intelligence; moral and ethical development; family relationships; educational status; social adjustment; and plans for the future.

e. The extent to which the foster family can meet the needs of a sibling group, in order to avoid the separation of siblings.

f. Proximity of the foster home to specialized services or facilities which the child may need.

Plaintiffs argue that the Equal Protection Clause bars discrimination solely on the basis of race. They point to *Palmore v. Sidotti,* 466 U.S. 429 (1984) as clearly established precedent, applicable to the defendants' conduct in the present case. In *Palmore,* the Supreme Court held that a natural mother's custody of her child could not be divested by a court order based solely on the perceived racial animus the child would encounter because the mother had married a man of a different race. Plaintiffs contend that *Palmore* established that "the consideration of race plays no role whatsoever in the regulation of family and domestic relationships." Plaintiffs find a factual correspondence between *Palmore* and the instant case in the State's common policy objective: in foster care placement determinations, as in custody determinations, the standard applied is the best interests of the child.

Plaintiffs find further support in *McLaughlin v. Pernsley,* 693 F. Supp. 318 (E.D. Pa. 1988). In *McLaughlin,* the court preliminarily enjoined removal of a black foster child from white foster parents and placement of the child with black foster parents, where the removal decision was solely based on race and pursuant to a policy of same-race placement. Although *McLaughlin* was decided well after the challenged actions in the present case took place, plaintiffs note that the *McLaughlin* court reached its conclusion based on its "plain observations" and general principles of equal protection jurisprudence. The implication is that, since the court was not "plowing new ground," the principles of equal protection clearly applied to foster care placement decisions and thus reasonable foster care decision makers in the defendants' place should have known that placement based on race was unconstitutional.

The Division argues that at the time they made the foster care placement decisions at issue in this case, there was no clearly established constitutional bar to the consideration of race as a factor in foster care placement. Defendants point out that no Missouri state cases or federal circuit court cases discuss if or

how the race of the child or prospective foster parents ought to be considered in foster care placement decisions. They also point to precedent in custody and adoption decisions that race may be considered as a relevant factor in determining the best interests of a child. *Drummond v. Fulton County Department of Family and Children Services,* 563 F.2d 1200, 1204-05 (5th Cir. 1977); *Annotation: Race as a Factor in Adoption Proceedings,* 34 A.L.R. 4th 167 (1982). Defendants further argue that adoption or custody cases involve final decisions regarding permanent custody of a child, and therefore are not directly analogous to temporary foster care placement.

While the *McLaughlin* case and the instant case both involved application of a race-based foster care placement policy,[4] there are several important differences. In *McLaughlin*, the court found that the decision to *remove* a black foster child from the home of white foster parents was based solely on race. *McLaughlin,* 693 F. Supp. at 324. The court also recognized that "the goal of making an adequate long-term foster care placement that provides for a foster child's racial and cultural

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[4] The district court apparently granted defendants' motion for qualified immunity on two grounds. First, the court observed that defendants acted pursuant to the Division's regulations and thus had not acted in bad faith. Second, the court noted that plaintiffs had "made conclusory allegations that defendants did not act in good faith."

An official's actions are not immunized because they were taken according to orders or regulations if the defendant still knew or should have known he was violating plaintiff's constitutional rights. *Patzner v. Burkett,* 779 F.2d 1363, 1371 (8th Cir. 1985); *Putnam v. Gerloff,* 639 F.2d 415, 422-23 (8th Cir. 1981). Following orders does not constitute a "good faith" defense against invidious racial discrimination.

As we indicate above, the appropriate inquiry, apart from any justification of following orders or regulations, is whether reasonable persons in the defendants' position should have known that their conduct violated clearly established constitutional rights. *See Myers v. Morris,* 810 F.2d at 1458-59.

needs" was consistent with the best interests of the child which was, in turn, a compelling governmental interest for purposes of the Equal Protection Clause. The court rejected the categorical application of race, but did recognize that a proper placement decision included a determination whether foster parents could adequately provide for a child's racial and cultural needs. *Id.* When we take into account that *McLaughlin* was a suit for a preliminary injunction, and not an action for money damages under §1983, we are further disinclined to read backward from the *McLaughlin* decision to the situation of Missouri government officials acting some four years earlier.

We decline to read *Palmore* as a broad proscription against the consideration of race in matters of child custody and foster care placement. The state court custody award reviewed in *Palmore* was based solely on race—the prospective social stigmatization the child would face from having a step-father of a different race. The Supreme Court held that "the effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of his natural mother found to be an appropriate person to have such custody." *Palmore,* 466 U.S. at 434. *Palmore's* holding that an otherwise fit natural parent may not be deprived of permanent custody based solely on race did not clearly establish that race may never be taken into account in determining the best interests of a child in a foster care placement decision. Even if the principle of the *Palmore* decision extended beyond its context of a custody determination and was applicable to decisions of temporary foster placement, at most the precedent establishes that race may not be the sole factor in determining the best interests of the child. Where, as here, the foster plan is ultimate reunification with their natural father, it would stand *Palmore*

on its head to read it as a bar to the consideration of race in determining the best interests of these foster children.[5]

III.

Under the unique circumstances of this case, consideration of race in a foster placement decision made pursuant to a regulation requiring that a child's racial and ethnic needs, among others, be taken into account is an insufficient basis for imposing liability. The constitutional standards for consideration of the racial, ethnic, or cultural needs of a child in foster placement were not so clearly established in 1984 that defendants should be forced to defend their decision in these damage suits.

Accordingly, the judgment of the district court dismissing the claims for money damages is affirmed.

A true copy.

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[5] Plaintiffs argue that the Division's reunification plan, as well as the other reasons cited for its placement decision, are pretextual; thus, defendants have the burden of rebutting the claim of pretext and establishing that race alone was not determinative. *See, e.g., Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). However, we need not engage in a mixed motive analysis, given our holding that the defendants' actions pursuant to the Division's Guidelines for foster placement did not violate any clearly established constitutional rights of prospective foster parents.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2224-EM

Order Denying Petition for Rehearing
and suggestion for Rehearing En Banc

J.H.H. and S.C.H.,
Appellants,

vs.

Joseph J. O'Hara, et al.,
Appellees.

Appellants' suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Lay, McMillian and Arnold would have granted the petition.

Petition for rehearing by the panel is also denied.

September 6, 1989

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, United States Court of Appeals, Eighth Circuit.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 87-152-C (4)

J.H.H. and S.C.H.,
Plaintiffs,

v.

Joseph J. O'Hara, et al.,
Defendants.

MEMORANDUM AND ORDER

This matter comes before the Court on defendants' motion for summary judgment.

Plaintiffs bring this action pursuant to 42 U.S.C. §1983 seeking compensatory and punitive damages, a declaratory judgment, and injunctive relief. Defendants are all present and former employees of the Missouri Division of Family Services. In the instant motion, defendants contend that they should be granted summary judgment because plaintiffs do not have standing to bring this action; that plaintiffs' claim for injunctive relief is barred by the doctrine of abstention; and that plaintiffs' claim for damages is barred by the doctrine of qualified immunity. In response, plaintiffs argue that they do have standing to pursue their claims, that the exercise of abstention in this case is unwarranted, and that defendants cannot claim good faith or qualified immunity for their conduct.

The Court will address the issue of standing first because its determination could be dispositive of the case. In order for this Court to properly exercise jurisdiction when the constitutionality of legislative or executive acts is at issue, there must be an ac-

tual "case" or "controversy" as required by Article III of the Constitution. The plaintiff must show that he personally suffered some actual or threatened injury; that the injury was as a result of the allegedly illegal conduct of the defendants and can be traced to the challenged activity; and that the injury is one that can be redressed by the Court. *See Valley Forge Christian College v. Americans United for the Separation of Church and State, et al.*, 454 U.S. 464, 472 (1982). The Court is aware of the fact that plaintiffs have not specifically challenged the constitutionality of the regulation as applied by defendants. However, since the constitutional basis for the lawsuit is an allegedly unconstitutional regulation, the Court will decide whether plaintiffs have standing in this case.

In the case at bar, plaintiffs, who are licensed foster care parents, allege that two foster children were removed from their home because they are white and the children are black, and this was done pursuant to the policies of the Missouri Division of Family Services which state that minority children should be placed with families of similar racial or ethnic characteristics. Viewing the evidence in the light most favorable to the nonmoving party, in this case the plaintiffs, *Addickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-9 (1970), this Court concludes that plaintiffs have suffered an injury in fact as a result of the policies of the Missouri Department of Family Services; and it is the kind of injury that could be redressed by this Court. Therefore, plaintiffs have standing to pursue their claim of racial discrimination.

However, plaintiffs have sued defendant in their individual capacities. As stated earlier, plaintiffs are employees of the Missouri Division of Family Services. As such, they have a qualified immunity from suits for monetary damages. *See Harlow v. Fitzgerald,* 457 U.S. 800 (1982). However, this qualified immunity can be rebutted by showing that the defendant lacked good faith. *See Clark v. Beville,* 730 F.2d 739 (11th Cir. 1984).

In the instant case, plaintiffs have made conclusory allegations that defendants did not act in good faith; nevertheless, they admit in their complaint that defendants acted pursuant to Missouri Division of Family Services regulations. The Court therefore finds that plaintiffs have not shown that defendants acted in bad faith so as to deprive them of qualified immunity and consequently defendants are entitled to immunity from an award of monetary damages in this case.

Defendants also contend that this action is barred by the doctrine of abstention because of ongoing state proceedings regarding the placement of the children. Plaintiffs argue that they are not a party to the proceedings, which are in juvenile court; therefore, they should not be barred from invoking their rights in this Court. Neither party has indicated to the Court precisely what proceedings are now in progress regarding the children in question. Therefore, the Court will not now substantially address this issue, but will deny the motion without prejudice.

The Court will give plaintiffs 30 days in which to reopen the case by refiling their complaint to name the proper defendants. Accordingly,

IT IS HEREBY ORDERED that defendants' motion for summary judgment is granted;

IT IS FURTHER ORDERED that the complaint is dismissed, but without prejudice, and plaintiffs are given 30 days in which to reopen the case without additional costs.

Dated this 14th day of July, 1988.

/s/ Clyde S. Cahill
United States District Judge